# Ramamurthi a/l Ramani v Sri Ram & Co (sued as a firm)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-393 OF 1996
SHAIK DAUD, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
27 FEBRUARY 1998

***Civil Procedure*** *— Appeal — Fact, finding of — Trial judge found that there was oral instruction to law firm to deduct from balance of deposit due to purchaser — Whether finding of trial judge was wrong — Whether appellant has discharged burden that trial judge was wrong in his conclusion*

The appellant appointed the respondent to act for him as his solicitors on a sale and purchase transaction of a piece of land belonging to the appellant. A sale and purchase agreement was executed and initial payments were made pursuant to the agreement. The respondent testified that on 22 September 1994 a meeting between the appellant and Mr C Vijaya Kumar ('Mr Kumar') from the respondent's firm took place where the appellant gave instructions to Mr Kumar to deduct the sum of RM700,000 from the balance of the deposit sum to be paid to a former partner of the firm. Acting on these instructions, the respondent forwarded to the appellant a cheque for the balance after setting-off the firm's professional fees and the aforesaid sum of RM700,000. The appellant refused to accept the cheque and requested the respondent to forward a cheque for the balance less only the firm's professional fees. The issue was whether the appellant had given an oral instruction to Mr Kumar to deduct the sum of RM700,000 from the balance of the deposit money and that the RM700,000 was already paid to the former partner of the respondent. The appellant denied having met Mr Kumar, but there was no denial by the appellant in respect of the instruction given to the firm to make the deductions.

**Held**, dismissing the appeal:

Whether an instruction had been given to the respondent or not was a question of fact. The judge had found that there was sufficient evidence to show that the appellant had given instruction to Mr Kumar to deduct the sum of RM700,000 which was to be paid to the former partner of the respondent. The learned judge also found that there was no denial of that instruction given or any countermanding instruction otherwise. Since this was the finding of the trial judge and the appellant had not convinced the court that the finding of the learned judge was wrong, that finding would stand. The burden was on the appellant to convince the appellate court that the learned judge was wrong in his conclusion. The appellant had failed to do so (see pp 749G–I and 750D); *Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 followed.

A [Bahasa Malaysia summary

Perayu telah melantik penentang untuk bertindak bagi pihaknya sebagai peguamcara atas suatu transaksi jual beli sebidang tanah kepunyaan perayu. Suatu perjanjian jual beli telah dilaksanakan dan bayaran permulaan telah dibuat menurut perjanjian tersebut. Penentang memberi keterangan bahawa pada 22 September 1994 suatu mesyuarat di antara perayu dan En C Vijaya Kumar ('En Kumar') dari firma penentang telah berlaku di mana perayu memberi arahan kepada En Kumar supaya menolak jumlah RM700,000 daripada baki jumlah deposit untuk dibayar kepada seorang bekas pekongsi firma tersebut. Bertindak atas arahan ini, penentang telah menghantar suatu cek kepada perayu untuk baki jumlah tersebut selepas menolak yuran profesional firma dan jumlah sebanyak RM700,000 tersebut. Perayu enggan menerima cek itu dan meminta penentang supaya menghantar cek untuk baki dengan menolak yuran profesional firm sahaja. Isu adalah sama ada perayu telah memberi arahan lisan kepada En Kumar untuk menolak jumlah RM700,000 daripada baki wang deposit dan bahawa jumlah RM700,000 sudah pun dibayar kepada bekas pekongsi penentang. Perayu menafikan pernah berjumpa dengan En Kumar, tetapi tiada penyangkalan oleh perayu berkaitan dengan arahan yang diberikan kepada firma untuk membuat tolakan itu.

**Diputuskan**, menolak rayuan:

Sama ada arahan telah diberikan kepada penentang atau tidak adalah satu persoalan fakta. Hakim telah mendapati bahawa terdapat keterangan yang mencukupi bagi menunjukkan bahawa perayu telah memberi arahan kepada En Kumar untuk menolak jumlah RM700,000 yang hendaklah dibayar kepada bekas pekongsi penentang. Hakim yang arif juga mendapati bahawa tiada penyangkalan tentang arahan yang diberikan itu atau apa-apa arahan yang membatalkan sebaliknya. Memandangkan ini adalah pendapat hakim perbicaraan dan perayu telah tidak meyakinkan mahkamah bahawa keputusan hakim yang arif adalah salah, keputusan itu akan kekal. Beban terletak pada perayu untuk meyakinkan mahkamah rayuan bahawa hakim yang arif adalah salah dalam kesimpulan beliau. Perayu telah gagal berbuat demikian (lihat ms 749G–I dan 750D); *Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 diikut.]

## Notes

For cases on appeal on finding of fact, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 366–435.

## Cases referred to

*Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 (folld)
*Taman Zahari Zabidi Sdn Bhd v Adnan Sundra & Low & Anor* [1990] 1 MLJ 424 (refd)

**Appeal from**: Originating Summons No R2–24–12 of 1996 (High Court, Kuala Lumpur) A

*Muralitharan Krishanan* (*K'Mura & Co*) for the appellant.
*Porres Royen* (*Fiona Bodipalar* with him) (*Sri Ram & Co*) for the respondent.

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**Mokhtar Sidin JCA** (delivering judgment of the court): In the present appeal, the defendant/appellant appointed the plaintiff/respondent to act for him as his solicitors on a sale and purchase transaction of a piece of land belonging to the appellant. The land was sold to Julung Perdana Sdn Bhd and a sale and purchase agreement dated 16 September 1994 was C entered between the appellant and the above-mentioned company. The consideration was RM20m of which RM1m was payable upon execution of the agreement. Of the balance, RM3m was to be paid within two months of the purchaser obtaining the necessary FIC approval and the balance RM16m to be deposited with the purchaser's solicitors as stakeholders at the expiry of 36 months from the date of FIC approval to D be released in accordance with the terms of the agreement.

Pursuant to that agreement, RM1m was released to the appellant on 18 September 1994. The purchaser also agreed to release on 22 September 1994 a sum of RM90,000 as an advance and part payment of the balance of the purchase price. According to the affidavit of the respondent, on/or E about 22 September 1994 a meeting between the appellant and Mr C Vijaya Kumar from the respondent's firm took place where the appellant gave instruction to Mr Kumar to deduct the sum of RM700,000 from the balance of the deposit sum to be paid to the former partner of the firm. On 8 August 1995, the balance of the deposit payable which was in the sum of RM2,918,769.86 was paid to the respondent to be held by the respondent F as stakeholder for the appellant. Acting on the instructions given to Mr Kumar, the respondent forwarded to the appellant a Bank of Tokyo cheque No 388044 in the sum of RM2,152,304.86, being the balance due to the appellant after setting-off the firm's professional fees in the sum of RM66,465 and the aforesaid sum of RM700,000. By a letter dated G 25 August 1995, the appellant refused to accept the cheque and requested the respondent to forward a cheque for the balance less only the firm's professional fees in the sum of RM66,465.

As a result of that, the respondent wrote to the appellant stating that the RM700,000 was to be placed in a fixed deposit pending the decision H of the court in respect of that sum. Apparently, the appellant agreed to this arrangement and on 30 August 1995, the RM700,000 was placed in a fixed deposit. The appellant then accepted the cheque for the balance which was given earlier.

The respondent then took up an originating summons seeking the following relief: I

(a) a declaration that the respondents are entitled to act upon the instructions given to them by the appellant on/or about 22 September

1994 to deduct the sum of RM2,918,769.86 received by the respondents as solicitors for the appellant on 8 August 1995; and

(b) a declaration that the respondents are at liberty to disburse the said sum of RM700,000 in accordance with the said instructions given by the appellant on or about 22 September 1994.

The appellant in his affidavit in reply admitted that the solicitor dealing with the sale of the property was the former partner of the respondent before he was elevated to the Court of Appeal. The appellant admitted that he had dealings with the former partner for a long time. However, in the affidavit, the appellant denied having met Mr Kumar and that he had given any instruction to the said Mr Kumar. The appellant admitted that a meeting did take place between him and the former partner of the respondent but that Mr Kumar was not in attendance at the meeting. The appellant further stated in the affidavit that he did not agree to pay the sum of RM700,000. The appellant further stated that, that was the reason why he refused to accept the cheque since the amount in the cheque did not include the sum of RM700,000.

The learned judge allowed the reliefs sought by the respondent as stated above. We agree with the learned judge that in the present appeal there is only one issue to be determined, that is whether the appellant had given an oral instruction to Mr C Vijaya Kumar to deduct the sum of RM700,000 from the balance of the deposit money to be paid to the appellant and that the RM700,000 was already paid to the former partner of the respondent. Mr Kumar at paras 5 and 6 of his affidavit deposed that a meeting did take place between himself and the appellant where the appellant gave specific instruction for him to deduct that amount from the balance of the deposit money. The appellant in his affidavit denied having met Mr Kumar, but there was no denial by the appellant in respect of the instruction given to the firm to make the deductions, viz the RM700,000 and the fees. It is to be noted that when the appellant took up the present action, he took it against the whole firm and not against any specific solicitors. As such, any instruction given to anybody in that firm, to us appears to be the instruction to the firm.

As correctly pointed out by the learned trial judge, the appellant has been the respondent's client from 1973 and the solicitor who was handling the appellant's legal matters was the former partner of the firm himself. Thus, since that day, it was the normal practice for the appellant to give oral instructions to the former partner, who would then carry out those instructions diligently. We agree that the relationship between the former partner and the appellant was very close, cordial and rather unique. There was mutual respect between them. This is evidenced by the fact that there was no claim of any fees being made by the former partner or by anybody in the respondent's firm against the appellant for all the legal works that had been carried out by the respondent.

The learned judge expressed the view that oral instruction as in the present appeal was not unusual between the parties and not impossible for the appellant to give even though the transactions was a RM20m sale. The

learned judge then went on to deal with the documentary evidence. His Lordship referred to the contents of the letter dated 16 August 1995 written by Mr Kumar to the appellant where at para 3 it read:

> In regards to the RM700,000 to be paid to Mr G Sri Ram you will recall your instructions on the matter to our Mr C Vijaya Kumar.

The appellant gave a reply on 25 August 1995 as follows:

> I wish to state that there is no monies owing by me to Mr G Sri Ram.

As can be seen from the reply, the appellant denied that he owed the former partner any money but there was no denial that he had given instructions to Mr Kumar to deduct RM700,000 to be paid to the senior partner of the firm. The letter from the respondent is clear and specific when it stated that there was such an instruction. The appellant in reply did not touch on that instruction at all. The respondent again, through a letter dated 29 August 1995 to the appellant, indicated that there was an instruction to deduct RM700,000 but, instead of denying that instruction, the appellant gave a reply that there was no monies due to the former partner of the firm. The letter dated 29 August 1995 also indicated that the respondent is taking out interpleader summons to determine that issue whether there was instruction as to the deduction on the sum RM700,000 and at the same time placed the RM700,000 in a fixed deposit. The reply which was also dated 29 August 1995 by the appellant was very brief stating that he agreed that the sum of RM700,000 be placed in a fixed deposit pending the outcome of the interpleader summons. Nowhere in this letter can be found any denial from the appellant as to the instruction in respect of RM700,000.

As can be seen from the correspondence between the parties, there were ample opportunities for the appellant to refute or deny the instructions given but the appellant failed to do so. It is clear from the authorities that an instruction purportedly given is binding unless there is evidence to show that the instructions given is denied or repudiated by one of the parties to the knowledge of the other. This is shown in the case of *Taman Zahari Zabidi Sdn Bhd v Adnan Sundra & Low & Anor* [1990] 1 MLJ 424. In that case, the appellant had retained the respondent to negotiate the purchase of lands at Telok Intan, Perak. The purchase of the lands were financed by Bank Bumiputera (M) Bhd through a bridging finance of RM20m. The bank retained the respondent to prepare the necessary documents for the loan. Pursuant to that loan, the bank issued a letter of undertaking in favour of the vendor. The appellant subsequently sent the sum of RM210,000 through a cheque to the vendor's solicitors being registration fees on the transfer of those lands to it and it also requested the bank to pay the sum of RM126,207 to the respondent as registration fees to charge the lands as security for its loan with the bank. The lands were eventually transferred to the appellant and building plans on those lands were approved by the relevant authorities. The vendor's solicitors then demanded for the release of the balance of the purchase price for the sale of those lands. At this stage, the appellant apparently changed its mind and

A decided not to proceed with the purchase. In order to abort the deal, the appellant sent a letter to the bank to countermand its instruction to pay the registration fees for the charges. No copy of the letter was sent to the respondent. The vendor's solicitors offered a loan to the respondent for the sum required for the registration fees and the respondent secured the loan from the vendor's solicitors, registered the charges and instructed the B bank to release the balance of the purchase price amounting to RM17m to the vendor. The respondent brought an action to claim disbursement of the sum of RM126,207 which they had made on behalf of the appellant. The appellant refused to pay, contending that the respondent had acted against its interests. The learned judge found that the appellant's contention C was baseless and awarded judgment for the respondent. The appellant appealed. The Supreme Court held that on the facts of this case, the respondent had not at any time acted in contravention of any instruction from the appellant. All along, the respondent was acting in accordance with the instruction of the appellant regardless of the facts that the sum required for the stamp duty had not been paid by the bank but advanced D by the solicitors for the vendors.

Abdul Hamid LP (as he was then) at p 426 said:

> Viewed in the light of these facts, it is clear that all along the respondent was acting in accordance with the instruction of the appellant regardless of the fact that the sum required for the stamp duty for the transfer had not been E paid by the bank but advanced by Mah & Partners. It would have been otherwise, or in other words, the respondent may be said to have acted in contravention of the appellant's instruction if the appellant had given notice to the respondent of their letter of 13 December 1982 to the bank countermanding the instruction given on 2 December 1982. There was nothing of that sort here.
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> The appellant's letter to the bank dated 2 December 1982 was not copied to the respondent. Nor was the respondent informed by the bank of the appellant's letter countermanding the earlier instruction. It is evident that the respondent had no knowledge whatsoever of the appellant's countermanding instruction. For these reasons, we have no reason to hold that the respondent had at any time acted in contravention of any instruction G from the appellant.

As can be seen from that case, whether an instruction has been given or not, is a question of fact. In the present appeal, the learned judge found that there is sufficient evidence to show that the appellant had given instruction to Mr Kumar to deduct the sum of RM700,000 which was to H be paid to the former partner of the respondent. The learned judge also found that there was no denial of that instruction given or any countermanding instruction otherwise. Since this is the finding of the trial judge and the appellant has not convinced us that the finding of the learned judge was wrong, that finding will stand. The burden is on the I appellant to convince us, the appellate court, that the learned judge was wrong in his conclusion. This is clearly shown in the case of *Samar bte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 at p 72 where Raja Azlan Shah FJ (as he was then) said:

> ... For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge.

It is clear to us the appellant has not convinced us that the learned judge had come to the wrong conclusion. For that reason, we would not disturb the finding of the learned judge. We therefore dismissed the appeal with costs.

*Appeal dismissed.*

Reported by David Lai